1968

The State of Utah v. Lawrence Mack Holt : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

LAWRENCE MACK HOLT,
Defendant-Appellant.

Case No. 10772

BRIEF OF APPELLANT

Appeal from a judgment and conviction of First Degree Murder in the Third District Court, Salt Lake County, Honorable Aldon J. Anderson, presiding

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—vs—

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STATEMENT OF NATURE OF CASE

This is a criminal appeal from a verdict and judgment of First Degree Murder with recommendation of leniency. The defendant was sentenced to life imprisonment by Aldon J. Anderson, Judge, Third Judicial District, Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

The defendant was sentenced to life imprisonment at the Utah State Prison following a recommendation of leniency by the jury. Sentence was imposed by Aldon J. Anderson, Judge, Third Judicial District, Salt Lake County, State of Utah.

RELIEF SOUGHT ON APPEAL

The appellenat seeks reversal of the judgment and conviction of First Degree Murder or in the alternative, a reduction of the charge to Second Degree Murder. Further in the alternative, the appellant seeks a reversal and remand for a new trial.

STATEMENT OF FACTS

On July 14, 1966,, one Bernice King was shot to death in a back alley located behind the Clark's Cafeteria in the Prudential Bank Building, 33rd South and State Street, Salt Lake City, State of Utah. (T-196) The body was discovered by Barr Petersen, Deputy Sheriff of Salt Lake County at 9:00 p.m. Also present at the scene of the shooting was one Richard Allen, who also had received a gun shot wound in the shoulder. (T-367) The cause of death of Bernice King was bullet wounds to the brain. (T-218)

On the day of the shooting, the defendant was observed by Helen Virginia Smith at the Crest Club where the latter was a bartender. She had been acquainted with the defendant and the victim for several years and was aware that the two had been going together for the past three years. (T-325)

The defendant had been in the Crest Club twice on the afternoon of the day of the shooting. The bartender

last observed the defendant at 6:00 p.m. when she got off work. (T-328) The defendant had been drinking that afternoon. He called the bartender at her home at about 7:30 p.m. of the same day and had appeared to be upset, in a bad mood and feeling bad. (T-330) The defendant wasn't himself. (T-344) She received another phone call later that evening wherein the defendant stated that he had shot Bernice twice. (T-332)

Just prior to the shooting, the deceased had phoned Richard Allen, a person whom she had apparently befriended as a fellow employee and asked that he pick her up because she was "a little troubled." (T-365) She was employed at the Clark's Cafeteria and was to get off work at 9:00 p.m. (T-365a) Mr. Allen responded to her request and went to pick her up at which time he observed two people struggling in the alley. As he pulled closer, he recognized the two people as the defendant and Bernice King. (T-366) He observed that the defendant had a gun. He got out of his car and attempted to stop the defendant. The defendant fired the first shot into the head of the deceased; turned and fired at Richard Allen striking him in the shoulder; turned and fired the second shot into the head of the deceased. (T-367) Mr. Allen stated that he told the defendant to "take it out on him." (T-367)

After the shooting, the defendant was seen running from the scene by the sister-in-law of the deceased. She saw him running east out of the parking lot, through the

back window of her automobile while it was parked at the A & W Drive Inn, across the street from the Clark's Cafeteria. (T-317)

Sometime after 9:00 p.m. the defendant arrived at the Clayburn residence and inquired if the parents were home. He appeared upset and stated that he just shot a lady. (T-271) He made a couple of phone calls and left between 10:00-10:30 p.m. exhibiting no signs of intoxication. (T-276) Two other phone calls were made to Duane Brinkerhoff about 11:00 p.m. and the defendant's voice was sharper and quicker and sounded excited. (T-486, 487)

The defendant left town and checked into the Stuart's Motel, in Brigham City on the night of the shooting. (T-256) The registration of the car checked with the registration of the car owned by the defendant at the time of the shooting. (T-256-263) The exact arrival time was unknown. (T-258) The next morning the defendant returned to the residence of one Henry Simmonetti, a friend of some 17-18 years. (T-351) He informed Mr. Sommonetti of his actions and turned the weapon and shells over to him. (T-351) At this time, the defendant appeared awful shaky. He broke down and started to cry. (T-531) The defendant remained in this condition for a period of 3-4 hours in the presence of Mr. Simmonetti and Duane Brinkerhoff, who subsequently arrived. (T-438) Thereafter, the defendant, in the company of the

two aforesaid persons, went to the Salt Lake City Police station and turned himself in and surrendered the gun and shells. (T-358)

The defendant had purchased the gun on the 15th day of March, 1966 for the purpose of giving it to his wife. (T-254) The weapon was described as a .32 automatic on the sales slip (Exhibit 29) and the police permit (Exhibit 321). (T-246) The three expended shells found at the scene of the crime also came from a .32 caliber weapon. (T-234)

The brother-in-law of the deceased testified that the defendant had made threats against the deceased some three weeks before at the Hickory Pit Cafe, stating that "she would be sorry."

Mary Lou Lemon was called to testify that she had met the defendant four days before the shooting and had been with the defendant at Denman's Golf course and observed a gun in the glove compartment of the defendant's car. (T-348) Further, she testified that she had a brother-in-law on the Sheriff's Department and had refused to go out with the defendant on the day of the shooting at about 6:00 p.m. because she had heard that the defendant didn't have too good of character reference to be going out with at that time. (T-348) During this conversation, the defendant told her that he was going to get even with a few people before 10:00 that night. (T-350)

The defendant was in love with the deceased and had been going with her for a period of three years. (T-325, 333) During the period of this relationship, he and the deceased had opened a joint saving and checking account, at Walker Bank and Trust. (T-477) He was dependent upon the deceased because he couldn't write or read. (T-336) He had purchased a Pontiac for the deceased, (T-334) together with other clothing and food. (T-342) The relationship had broken down and the defendant lost weight, became moody, and began drinking excessively. (T-336)

On the day of the incident, the defendant appeared to want to talk to Helen Virginia Smith, the bartender of the Crest Club. He appeared nervous, fidgety, upset, and cried. (T-340) Most of the conversation was about the deceased and his conversations with the deceased. (T-342)

On the afternoon of the incident, the defendant went out to the Walker Bank and presented a withdrawal slip for $300.00 on the joint account. (T-465) He appeared emotionally upset and left without getting the money. Miss Betty Paxon, teller, testified that she had to call the defendant back and give the defendant the money whereupon he stated that he wanted it transferred to the checking account. (T-465) The defendant's conduct exhibited a total unfamiliarity with banking procedure. (T-466) Earl Jones, manager of the office, testified as to the procedure for opening an account and the signature card.

(Exhibit 37). The saving account ledger (Exhibit 36 deposit slips, (Exhibit 38) and withdrawal slips (Exhibit 39) were introduced into evidence. (T-473-475)

Doctors Louis G. Moench and William D. Pace, psychiatrists, were called by the defendant to establish the defense of insanity. Both had examined the defendant on the 5th day of July, 1966. Doctor Moench is a graduate of the University of Chicago School of Medicine, intern and residence at the L.D.S. Hospital in Salt Lake City, residency in psychiatry, McLean Hospital and resident in psychiatry at Lanporter Clinic at the University of California. He is a member and past president of the Utah Psychiatric Association. He has practiced his specialty of psychiatry for the past 20 years and has examined thousands of patients. (T-393-394)

On July 5, 1966, Doctor Moench conducted a Mental Status examination which consisted of a medical and psychiatric history, family and social history, review of the events for which the defendant was brought before the court. (T-393) This examination is designed to test the person's assessment of reality at the time of the examination and to make an estimate of his intellectual capacity. (T-394) This included a diagnosis as to the defendant's mental condition as of the time of the incident (T-394) At the time of the shooting, the defendant's condition was "acute associative relation," which "represents a dissociation or separation of a person's awareness of

reality and a dissociation and a separation of his thinking, feeling, and acting, so that they are not entirely coordinated." (T-396) Further, at the time of the shooting, it was the psychiatrist's opinion that the defendant was insane; (T-397) that "his knowledge of the rightness or wrongness was seriously impaired; (T-397) the defendant's awareness of the nature and quality of his acts was seriously impaired; (T-397) that the defendant's capacity to adhere to the right due to some mental condition was "very seriously impaired." (T-398) The psychiatrist's opinion indicated that the defendant would have committed the act in the presence of policemen with guns drawn. (T-398) Further, it was his opinion that the defendant was severely disorganized, for approximately a week prior to the incident. (T-398) The defendant's condition was deemed as temporary insanity. (T-399)

Doctor Moench further stated that in his opinion the defendant's capacity to form a specific intent to kill, or his ability to make a choice to kill or not to kill, or his ability to develop the intent to create great bodily injury was seriously impaired, though not impossible. (T-431-432)

Dr. William D. Pace, another psychiatrist, substantiated Doctor Moench's testimony and opinions. Doctor Pace examined the defendant separately on the 6th day of July, 1966 utilizing the Mental Status examination. (T-435) At the time of his examination he discovered "a

mental condition or disorder existed and there was some indication of its continuance." (T-435) His diagnosis at this time was "psychotic reaction in an emotionally unstable, inadequate and disorganized individual with a poor tolerance of alcohol." (T-435) "A psychotic reaction refers to a mental disorder which is characterized by one or all of an order of effect or mood changes in thinking and behavior, in some cases very often withdrawal from reality and a tendency to operate on the basis of self-centered thinking or behavior rather than what is going on about them." (T-435)

Using psychosis and insanity interchangeably, the psychiatrist testified that in his opinion the defendant was psychotic at the time of the commission of the offense. (T-436) Further, it was his opinion that at the time of the commission of the offense, the defendant could not make the distinction between the right and wrongness of the act according to law and morals; and that, due to the "mental illness," the defendant lacked the capacity to deliberate and plan to kill. (T-438) He did not think that "there was any deliberation in reaching a decision on his part on that basis." (T-438) His opinion was based upon what the defendant had told him and on what he observed in the way the defendant told him about these things. (T-438) Moreover, the defendant was found to be "substantially below average intelligence." (T-438) In the doctor's judgment, he had sufficient information to arrive at an opinion without the necessity of any further psychological test, including a Roschach test. (T-457)

When confronted with the prosecutor's question regarding the presence of a police officer with his guns drawn, it was the doctor's opinion that the defendant would take another step toward the deceased in spite of the officer's threat that he would shoot if the defendant took another step. (T-450) Again on cross-examination, the psychiatrist stated that it was his opinion that the defendant was not thinking at the time that if he pulled the trigger when it was up against the deceased's head that it would cause great bodily injury or probable death. (T-453-454) Rather, he describes the defendant's mental condition as "a disorganized, unthinking behavior rather than deliberate attempt to or a deliberate action of killing her." (T-454)

Along this same line, the psychiatrist stated that the defendant was suffering from a mental disease which would prevent him from controlling impulses, (T-454) to wit: a psychosis which he had over a period of several weeks in which impulses were not controlled. (T-454) The defendant's ability to discern the difference between right and wrong was markedly impaired, (T-456) i.e., it was closer to being destroyed than it would be to being intact. (T-456) Other facts will be brought out during the course of argument.

POINT I

THE EVIDENCE DOES NOT JUSTIFY THE VERDICT OF MURDER IN THE FIRST DEGREE IN LIGHT OF THE

UNREBUTTED TESTIMONY OF THE PSYCHIATRIST THAT THE DEFENDANT WAS INSANE AT THE TIME OF THE ALLEGED ACT.

The appellant respectifully submits that the evidence adduced at trial by the defendant as to the defendant's insanity at the time of the offense was not rebutted by the prosecution so as to sustain the burden of the prosecution to prove the defendant was sane at the time of the offense beyond a reasonable doubt.

The test of legal insanity in the State of Utah is a combination of the M'Naughten's rule and the irresistible impulse rule, to wit: that at the time of the act, the accused was laboring under a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know he was doing what was wrong; or that he was under an impulse of such a magnitude as to override reason and judgment and obliterate the sense of right and wrong. *State v. Poulson,* 14 Utah 2d 213, 381 P. 2d 93 (1963); *State v. Green,* 78 Utah 580, 6 P. 2d 177 (1931)

In the trial of a criminal case, there exists a presumption of sanity at the time of the alleged act. *State v. Green, supra.* This presumption, however, gives way and is overcome by evidence tending to prove insanity. *State v. Green, supra.* It is incumbent upon the defendant to bring forward evidence in support of justification or excuse. *State v. Vacos,* 40 Utah 169, 120 P. 497 (1911). When

the defendant introduces some evidence to raise the issue of insanity, his sanity at the time of the offense becomes an element of the crime, which, like all other elements of the crime, must be proved by the State beyond a reasonable doubt. *Wright v. United States,* 250 F. 2d 4 (D.C. Circuit 1957). The defendant need not establish insanity by the preponderance of evidence before he is entitled to avail himself of the defense of insanity. *State v. Green, supra.* As this Court in *State v. Vacos, supra,* stated:

> "All that he is required to do is to produce sufficient evidence of justifcation or excuse, which, then considered with all the other evidence in the case, will create a reasonable doubt in the minds of the jurors whether the homicide was justified or excusable or not."

The burden on the prosecution is clear. Where the evidence submitted by the defendant tends to establish insanity at the time of the act, the prosecutor bears the burden to convince the jury, beyond a reasonable doubt, that the defendant was not insane. This burden must be met by evidence independent of and uninfluenced by the presumption of sanity. *State v. Green, supra.* The sanity of the defendant becomes a jury question unassisted by any presumption and the matter must be decided upon the weight of the evidence adduced by the prosecution. *State v. Green, supra.*

As background information, this Court should be aware that a notice of the intent to rely upon the defense

of insanity was filed prior to trial. Pursuant to this notice, two alienists were appointed by the Court to examine the defendant pursuant to Utah procedure. Utah Code Annotated (1953) 77-22-16, 77-48-2 (as amended).

Doctors Louis G. Moench and William D. Pace, psychiatrists, were duly appointed. (T-5) Each performed a mental status examination independently of each other.

After the examinations, a mental hearing was held before the Honorable Stewart M. Hanson on July 13, 1966, where in Dr. Louis G. Moench, was called by the State to testify. (T-572) After, testifying that the defendant was competent to stand trial, (T-573) the lower court permitted defense counsel to examine with regard to mental condition at the time of the trial over objection of the prosecutor. Doctor Moench stated that in his opinion the defendant was probably insane at the time of the alleged crime (T-575); further, that due to the defendant's mental condition, he was not aware of the nature and quality of the act at the commission of the act; (T-575) further, that the defendant, due to his mental condition, was unable to distinguish between the rightness and wrongness of his act. (T-576) On questioning by the prosecutor, the psychiatrist testified that he found the defendant to be of low mentality. (T-580)

It was further pointed out that at the time of the act the defendant was suffering from an "acute dis-

sociative reaction." (T-585) It was the opinion of Doctor Moench that the defendant's judgment and his capacity to make a choice as to kill or not to kill was very seriously impaired at the time of the act; moreover, the defendant's will power to chose the right from the wrong was seriously impaired, though not completely lost. (T-585) Similarly, the Doctor's opinion indicated that the defendant's capacity to formulate any plan, design or intention to kill was "very, very seriously impaired," although he could not say it was absent. (T-585)

In the light of this type of testimony at the mental hearing, the defendant went to trial for murder in the first degree. After the prosecution had rested, the defendant called Doctors Louis G. Moench and William D. Pace as defense witnesses. Dr. Louis G. Moench stated that the defendant was suffering from a temporary insanity at the time of the shooting and this temporary insanity was described as "acute associative relation." This was defined as representing a dissociation or separation of a person's awareness of reality from reality and a dissociation and separation of his thinking, feeling, and acting, so that they are not entirely coordinated. (T-396) Further, it was his opinion that the defendant was insane and that his knowledge of the rightness or wrongness was seriously inpaired as was his awareness of the nature and quality of his acts and his capacity to adhere to the right. (T-398) He unhesitantly stated that the defendant would have committed the act in the

presence of a policeman with guns drawn. (T-398) Moreover, the defendant's capacity to form a specific intent to kill or to make a choice to kill or not to kill or to develop the intent to create great bodily injury was seriously impaired, though not impossible. (T-431-432)

Dr. William D. Pace further substantiated Doctor Moench's opinions. Doctor Pace found the defendant to be psychotic at the time of the commission of the act. (T-436) The defendant could not make the distinction between right and wrongness of the act according to law and morals and that due to the "mental illness," the defendant lacked the capacity to deliberate and plan to kill. (T-438) Doctor Pace concurred with Doctor Moench with regard to the police-presence test. (T-450) On cross-examination, he describes the mental illness or disease as being disorganized, unthinking behavior rather than a deliberate attempt to or deliberate action of killing the victim. (T-454) The defendant was suffering from a mental disease which prevented him from controlling impulses. (T-454)

After the testimony and cross-examination of the psychiatrists and another lay witness, the defense rested. The prosecution did not present any testimony rebutting the evidence adduced from the psychiatrists with regard to the defendant's mental condition at the time of the commission of the offense.

It is submitted that the prosecution clearly failed to present proof beyond a reasonable doubt as to the defendant's insanity. Cross-examination of the psychiatrist called by the defendant yielded no meaningful fruit for the prosecution. Rather, the cross-examination further affirmed the psychiatrist's testimony. There was no medical testimony whatsoever to exclude the hypothesis of insanity, nor was there any rebutting of non-expert testimony. Under such circumstances, the Federal Court has held that as a matter of law a reasonable doubt was created. See *Douglas v. United States,* 239 F. 2d 52 (D.C. Cir. 1956)

This court has made a similar pronouncement in *State v. Brown,* 36 Utah 46, 102 P. 641, 24 L.R.A., No. S. 545 (1909) wherein the defense of insanity was raised and the testimony of mental unsoundness was undisputed and there was no evidence of sanity. This court aptly noted:

> "There, no doubt, may be instances where the evidence offered by the defendant upon the question of his sanity is so weak and inconclusive that the state may well insist upon the presumption of sanity and thus need not offer any evidence in rebuttal of defendant's evidence upon the question. Could it be said, however, that this is so in all instances because it may be so in some? It seems to us that this case offers a striking illustration that this cannot be so . . . . counsel for the state contends that the jury was authorized to take into consideration defendant's acts and

> conduct before and at the time he committed the offense; that in doing what he did his acts seemed rational. In other words that the defendant acted as others guilty of like acts ordinarily do when he committed the forgeries. Hence the jury were justified in finding him guilty. It seems to us, however, that when his acts are analyzed, they hardly support this contention." 36 Utah at p. 55, 56.

In speaking of the presumption of sanity, this court noted in *State v. Brown, supra,* that the state is not required to adduce any evidence that the defendant was sane, since the presumption of sanity makes a *prima facie* case in that issue. This court went further and stated:

> "But after the appellant by an overwhelming mass of evidence, had rebutted the presumptions of sanity, the jury is not authorized to arbitrarily disregard the evidence of insanity, all of which was in effect, conceded by the State, to be true and make a finding based upon a presumption which had been entirely overcome. When this presumption was overcome, there was absolutely no evidence to support the verdict, for the reason that, apart from the presumption of insanity, the evidence upon this issue is all one way, and is clearly to the effect that the appellant was insane. The presumption was therefore overcome, beyond any doubt. Upon this question, there is no room for reasonable men to differ. We venture to assert that no one who is unbiased can read the record in this case without arriving at the same conclusion." 36 Utah at p. 58.

Also, see *Frigillana v. United States,* 307 F. 2d 665; *Brock v. United States,* ..... F. 2d ..... 5th Cir. 1967. These Federal Courts held that the government had failed to sustain its burden of proof and that a directed verdict should have been entered finding the defendant not guilty by reason of insanity.

In *Wright v. United States,* 250 F. 2d 4, 7 (D.C. Cir. 1957), the government's only evidence to sustain its burden of proving beyond a reasonable doubt that the defendant was sane was the testimony of two policemen as opposed to the testimony of eleven psychiatrists as to the defendant's insanity. The court again held that the government had failed to sustain its burden. Moreover, the court rejected the government's contention that some of the doctors expressed their opinions in varying degrees of probability by stating that the opinion to which psychiatrist's testifies need only be "the type of clinical opinions he is accustomed to form and to rely upon in the practice of his profession." It need not consist of "mathematical demonstrable certainties." *Blunt v. United States,* 244 F. 2d 355, 364 (1957).

Further support for the appellant's position in the case at bar is found in *McKenzie v. United States,* 266 F. 2d 524 (10th Cir. 1959) and *Pollard v. United States,* 282 F. 2d 450, (6th Cir. 1960). In the former case, the prosecution offered no medical testimony, but relied entirely upon the testimony of non-expert witnesses to

whom the defendant was a stranger. The substance of the testimony of these witnesses was that they observed nothing unusual or abnormal about the defendant immediately before and after the alleged crime. The Federal Court held that this evidence was insufficient. *McKenzie v. United States, supra,* at 458-459.

In the instant case, no expert or non-expert testimony of witnesses was adduced by the prosecution. Rather, the prosecution relied solely upon cross-examination of the State appointed psychiatrists who were called upon by the defense.. It is argued that this cross-examination was inadequate to sustain the prosecution's burden of proving the defendant's sanity beyond a reasonable doubt.

The appellant respectfully submits that the unrebutted evidence as to the insanity of the defendant at the time of the alleged act warrants a reversal of his first degree murder conviction and an order by this court remanding the case with directions to find the defendant not guilty. In the alternative, the appellant requests that the evidence as to the defendant's mental capabilities for possessing the necessary mental frame of mind so as to deliberate and premeditate the act of killing was sufficient to reduce the crime to Murder in the Second Degree. *State v. Green,* 78 Utah 580, 6 P. 2d 177 (1931); *State v. Kruchten,* 101 Ariz. 186, 417 P. 2d 510 (1966); *State v. McAllister,* 41 N.J. 342, 196 A2 786.

In *People v. Wolff,* 40 Cal. Rptr, 271, 394 P. 2d 959 (1964), the California court reduced the conviction of first degree murder to second degree murder. This was accomplished due to the evidence of the defendant's youth and undisputed mental illness which limited the extent to which the defendant could maturely and meaningfully reflect upon the gravity of his contemplated act. In the instant case, the defendant was found to be of low mentality and at the time of the act was suffering from an "acute dissociative reaction" which very seriously impaired the defendant's judgment and his capacity to make the choice as to kill or not to kill and further, the defendant's capacity to formulate any plan, design or intention to kill was "very, very seriously impaired." The evidence would not support a conviction for first degree murder.

POINT II

THE TRIAL COURT ERRED IN THE DENIAL OF PRETRIAL AND TRIAL INSPECTION OF WRITTEN STATEMENTS OF WITNESSES.

The defense filed a motion for a Bill of Particulars on June 6, 1966. This was answered by the prosecuting attorney on June 16, the Saturday before trial. The answer contained the names and addresses of some 33 state's witnesses. (T-13, 14) The prosecutor refused to answer defendant's requested question No. 5 which stated:

> "5. Whether the State has any written statement of any of the witnesses obtained in the investigation of the charge. If so, attach a copy of the same." (T-3)

The point on appeal deals specifically with the right of the defendant to discovery in criminal actions. It is the defendant's contention that the denial of the right of discovery in the instant case deprives the defendant of his right to full and complete confrontation with witnesses against him, to be informed of the nature and cause of the accusation, to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment of the United States Constitution as made applicable to the states through the Fourth Amendment and Article I Section 12 of the Utah Constitution.

The pertinent statute with which this point is concerned is found in Utah Code Annotated (1953) §77-21-9

> "(1) When an information or indictment charges an offense in accordance with the provisions of section 77-21-8, but fails to inform the defendant of the particulars of the offense, sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the Constitution of this state, the court may, of its own motion, and shall at the request of the defendant, order the prosecuting attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; or the

prosecuting attorney may of his own motion furnish such bill of particulars.

(2) When the court deems it to be in the interest of justice that facts not set out in the information or indictment or in any previous bill of particulars should be furnished to the defendant, it may order the prosecuting attorney to furnish a bill of particulars containing such facts. In determining whether such facts and, if so, what facts, should be so furnished, the court shall consider the whole record and the entire course of the proceedings against the defendant.

(3) Supplemental bills of particulars or a new bill may be ordered by the court or furnished voluntarily under the conditions above stated.

(4) Each supplemental bill shall operate to amend any and all previous bills and a new bill shall supersede any previous bill.

(5) When any bill of particulars is furnished it shall be filed of record and a copy of such bill be given to the defendant.

In raising the issue of discovery, the appellant is not unmindful of the limited precedent which finds itself in *State v. Jameson,* 103 Utah, 129, 134 P. 2d 173 (1943) and *State v. Lack,* 118 Utah 128, 221 P. 2d 852 (1950). The bill of particulars need not plead matters of evidence nor was it intended as a devise to compel the prosecution to give the accused person a preview of the evidence

which the State relies to sustain the charge. It is the appellant's contention that these precedents should be re-examined in light of the trend in discovery in criminal cases.

The position of the appellant is not without authority in the State of Utah. In a landmark case, this Court allowed pre-trial discovery of grand jury minutes. *Utah v. Faux,* 9 Utah 350, 345 P. 2d 186 (1959). The majority speaking through Chief Justice Crockett aptly pointed out that the purpose of a criminal trial is not to convict but to seek the truth and administer justice, ". . . truth should have nothing to fear from light." 9 Utah at 355. Having admitted that the trial court has discretion to permit the use of grand jury testimony for impeachment at the time of trial, the majority extended this process to pre-trial inspection after scrutiny by the trial judge. The rationale seemed to lie in the cumbersome procedure which would prevail if pre-trial disclosure were not permitted. Nor would it appear that any foundation as to whether the prior testimony was inconsistent need be laid for the pre-trial discovery since it is obvious that the defense would know whether there was an inconsistency unless he knows what the prior testimony was and it is unlikely that a witness would voluntarily reveal that he had previously testified differently. Nor was the majority opinion concerned with furnishing the defendant with a basis for preparation of perjured testimony, noting that if the defendant will engage in such lawful machination-

the time element is not going to prevent it and other processes of law must cope with such unlawful conduct. 9 Utah at 353.

The most recent cases dealing with discovery in criminal cases are compiled in 7 ALR2d 8. Although it is stated in that annotation that discovery is not a matter of right, the annotation further reveals that a growing number of jurisdictions have extended pre-trial discovery in criminal cases based upon trial court's discretion. 7 ALR Sec. 5, p. 36.

The trial court enhanced the error when he refused to permit defense counsel to inspect the prior statement of Edith Larson, state's witness, for the purpose of cross-examination during the course of trial. (T-304) Thereafter, defense counsel indicated that the defendant is entitled to see any written reports that were given by any witnesses in this case that are in the possession of the District Attorney's Office for purpose of cross-examination. (T-134) This was refused by the District Attorney and sustained by the trial court. (T-135) Thereafter, a motion for mistrial was made and overruled. (T-134) Prior written statments of Joyce Rich, another state's witness was requested and denied. (T-321, 324) Moreover, the request for prior statements, unsigned, of Richard L. Allen, State's eye witness, was initially refused by the trial court. (T-377) After a conference in chambers, wherein it was pointed out to the court that

the transcript of the preliminary hearing had not been prepared and that the answer to the bill of particulars was provided on the Saturday before trial (a period of two days), defense counsel was permitted to read the prior statement in chambers, but was not permitted to have access to the statement during cross-examination. (T-385) After the court's ruling on the prior statement of Joyce Rich, defense counsel deemed it futile to make any further requests for inspection of prior statements of any other state's witnesses, including Mary Lou Lemon who was a critical witness to establish premeditation. After the state rested, defense counsel requested an in camera inspection of the District Attorney's files which was denied. (T-384)

There is no question that prior statements are to be made available to defense counsel after the witness has testified for the purpose of cross-examination. *Utah v. Faux, supra.* This is so without a requirement of establishing that in inconsistency exists. *Jenck v. United States,* 353 U.S. 657 (1957); *Utah v. Faux, supra; Campbell v. United States,* 365 U.S. 85 (1961); *People v. Chapman,* 52 Cal 2d 95, 338 P. 2d 428 (1959); *Funk v. Superior Court,* 52 Cal. 2d 423, 340 P 2d 593 (1959); *People v. Estrada,* 54 Cal. 2d 713, 355 P. 2d 641 (1960), wherein the court stated:

> "Either before or during the trial, the accused can compel the people to produce the written statement of a prosecution witness relating to

> matters covered in testimony. In laying a foundation for production, the accused is not required to show the document was signed by a witness or otherwise acknowledge by him as accurate or that there is any inconsistency between the statement and the testimony of the witness . . (citations omitted) The value of obtaining such a statement is that it may contain contradictions of the testimony of the witness, may omit facts related by him at the trial, or may reveal a contrast in emphasis placed on the same facts. A defendant is not ordinarily in a position to show such matters until he has seen the statement."

A policy consideration of constitutional purportions should be kept in mind in assessing the defendant's right to pre-trial discovery in a criminal case. The United States Supreme Court has said in *Brady v. Maryland*, 373 US. 83 (1963):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87.

It is submitted that in order to avoid the subsequent danger of an improper suppression, the trial court should be liberal in allowing discovery in criminal cases. This danger would be minimized if discovery in the manner herein requested is permitted. This discovery should be expanded to permit in camera inspection by the court of

the prosecutor's file at or before the end of the prosecution's case. Fairness and efficiency require that the prosecution reveal material evidence of substantive value to the defense. The failure of the trial court to permit inspection of the prior statements effectively denied the appellant the right to confront the witnesses, right to effective counsel, and right to a fair trial. Failure to grant pre-trial inspection and trial inspection is clearly prejudicial and reversible error.

POINT III

THE COURT ERRED IN PERMITTING TESTIMONY OF THE DEFANDANT'S BAD REPUTATION WITHOUT THE SAME BEING PUT IN ISSUE BY THE DEFENDANT.

The trial court permitted Mary Lou Lemon, a state's witness, to testify to a conversation had with defendant a few hours before the shooting. (T-348) At about 6:00 p.m. on the night of the shooting, she stated that the defendant had called her and asked her for a date. She refused stating, "I said I heard he didn't have too good of character references to be going out with at that time." (T-350) This testimony was admitted over defense counsel's objection. (T-349, 350) It was apparent from the witnesses prior questions and answers that she had received some information concerning the defendant's reputation from her brother-in-law, who was the deputy sheriff, Barr Petersen. He testified that from information received from his wife, who had apparently talked

to Mary Lou Lemon, he instructed Deputy Higgins to patrol Mary Lou Lemon's house. This information was received and the instructions were given some 4 hours prior to the shooting. (T-203) Further, he testified that he also kept a lookout for the defendant. (T-204) Defendant's objections and motions to strike were overruled.

The obvious direction in this line of questioning by the prosecutor was to place before the jury the inference that the defendant was of bad character, evil minded and dangerous to such an extent as to require a protective measure to be instituted. This is clearly prejudicial to the defendant. The witnesses' conduct in establishing protective measures for a third party has no probative value in establishing the defendant's mental frame of mind toward the deceased. This assertive conduct by the deputy sheriff was clearly detrimental to and in derogation of well-founded principles that the state cannot show the bad character of the accused until the accused has raised the issue by offering evidence of good character. *State v. Hougensen,* 91 Utah 351, 64 P. 2d 229 (1936); *State* v. *Thompson,* 58 Utah 291, 199 P. 161, 38 ALR 697 (1921); 29 Am. Jur. Sec. 340. Testimony which has the direct effect of showing the cruel and evil nature of the accused is to be condemned. *People v. Gougas,* 410 Ill. 235, 102 N.E. 2d 152, 28 ALR 2d 852 (1951) The rationale for the rule is clearly to prevent the deep tendency of human nature to punish, not because the accused is guilty, but

because he is a bad man. The rationale is equally applicable to the case at bar.

The testimony of Barr Petersen as to his assertive conduct in instructing another deputy sheriff to patrol Mary Lou Lemon's house was clearly immaterial and irrelevant as to issue of guilt or innocence of the shooting of Bernice King. This conduct was solicited by the prosecution solely to show the jury that in one man's mind the accused was a person to be watched and protected against, to wit: that he was a person of potential dangerous character. It should be kept in mind that his testimony was further prejudiced due to the fact that he was a deputy sheriff and one of the investigating officers. Moreover, Mary Lou Lemon's testimony falls within the same flavor as Barr Petersen's.

She was permitted to testify that she didn't want to go out with the accused because he didn't have "good character references." Clearly, this testimony was not offered as the truth of the matter asserted and therefore was not hearsay. The apparent reason for permitting said testimony which, in effect, represents a conclusion on the part of the witness, was that it was a verbal act i.e., the statement was offered as evidence of a fact directly observed by a witness or to show the fact of its having been made. 1 Wharton's Criminal Evidence, Sec. 257. This verbal act was submitted to show the declarant's state of mind and illustrated to the jury that she felt the

the defendant was not a fit person to be associated with. In turn, the jury viewed her testimony as imputing a bad character and therefore the testimony was objectionable under the rule previously announced. The effect of her testimony is more prejudicial when it is submitted to the jury without any limiting instructions by the trial court not to consider the statements of Mary Lou Lemon as the truth of the matter stated. Consequently, the jury was at liberty to consider her testimony in any manner which they chose to the detriment of the defendant, who did not take the stand. The net effect of permitting her testimony to stand was to place upon the defendant by cross-examination or by independent evidence the added burden of negating the direct inference of bad character with regard to the defendant's relationship with Mary Lou Lemon. This burden was improperly placed upon the defendant and consequently, the defendant chose not to meet it during the trial. To permit such testimony was clearly prejudicial to the defendant in that it permitted the jury to consider one person's opinion as to the character of the defendant on an issue solely foreign to the issues at hand and further, it embedded an inference in the mind of the jury which cast doubt on the defendant's character, which inference could not be refuted except by placing the defendant on the stand thereby violating his rights under the Fifth Amendment and to have the issue of guilt or innocence determined by a fair trial.

POINT IV

THE COURT ERRED IN NOT PERMITTING THE DEFENDANT'S WITNESSES TO TESTIFY AS TO THE DEFENDANT'S MENTAL CONDITION IMMEDIATELY FOLLOWING THE COMMISSION OF THE OFFENSE.

The defendant called Duane Brinkerhoff as a defense witness. This witness testified that he had a conversation with the defendant over the phone about two hours after the commission of the offense. (T-486) The conversation lasted for a period of 20 minutes and the defendant's voice appeared sharper, quicker and excited. (T-487) The defense then asked what this witness said to the defendant. The objection was sustained by the trial court on the basis that the witness's conversation to the accused was hearsay. (T-488) The objection was sustained after an offer of proof was made. The offer was not made a part of the record. (T-487)

The appellant submits that the trial court committed prejudicial error in sustaining the prosecutor's objection as to what the witness said to the defendant two hours after the shooting. What this witness said to the defendant is clearly not hearsay. Hearsay in its most simple form has been defined as evidence which a given witness offers in court which is not based upon his own personal knowledge and which is offered as proof of the matter stated herein. 1 Wharton, Sec. 249. What Mr. Duane Brinkerhoff said to the accused is clearly within his personal knowledge. He would have been testifying as

to what he said, not what anyone else had related to him. Although not a matter of record, Mr. Brinkerhoff would have testified that he told the accused that he was sick and that he needed the help of a doctor.

Testimony of a lay witness who is acquainted with the accused is competent evidence to establish the defendant's state of insanity. *State v. Brown,* 36 Utah 46, 102 P. 641 (1909) In the *Brown case,* some fourteen defense lay witnesses were permitted to testify that the defendant at the time of the alleged offense was mentally unbalanced. In the instant case, the lay testimony of Mr. Duane Brinkerhoff was admissible and probative to the issue of insanity which was the sole defense relied upon by the defense. His testimony was corrobative of the testimony of Dr. Louis G. Moench and Dr. William D. Pace. For the trial court to deny the testimony of a lay witness was to deny the defendant the constitutional right to have witnesses called in his behalf and to testify to all matters pertinent to the issue within the rules of evidence.

CONCLUSION

The appellant respectfully submits that points herein presented to this Court warrants a reversal of the conviction of First Degree Murder. The prosecution has failed to meet the burden of proving the sanity of the defendant beyond a reasonable doubt by failing to present independent evidence of the defendant's sanity. The

instant case illustrates the frustrations of defense counsel in presenting a legitimate and supportable defense of insanity only to have the law and facts ignored by the jury. The criminal case ought not to depend upon the rhetoric of counsel, but should depend upon the presentation of evidence to the jury, giving defense counsel reasonable opportunity to confront witnesses. Discovery of the nature sought in the instant case will only enhance the criminal process by eliminating the cat and mouse tactics of counsel. Movements toward the ultimate end of seeking the truth is the proper function of a criminal trial.

Respectfully submitted,

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